Supreme Court, U.S.
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No. 93-253

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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DEBRA J. GRUNWALD, *et al.*,

*Petitioners,*

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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August 1993

## QUESTIONS PRESENTED

I. Do the procedural safeguards mandated by the First and Fourteenth Amendments to the United States Constitution as enumerated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), for the compulsory exaction of union fees from the wages of nonunion public school teachers include:

A. pre-collection reduction of an objecting teacher's dues-equivalent fees by that amount which the union concedes is spent on constitutionally nonchargeable activities, rather than the forced exaction of both the chargeable and nonchargeable amounts and placement of those amounts, including the concededly nonchargeable amounts, in escrow for two and one-half months before refunding the amount improperly seized; and

B. pre-collection distribution of the notice required by *Hudson*, rather than post-collection distribution two to three weeks after the first seizure?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

**Petitioners:** Lewis N. Adams, Vicki F. Burdeaux, Maria L. Busselle, Delores Camara, Janice Cody, Juliana Coughlin, Sally K. Delnort, Susan Dent, Aeryn G. DeWalle, Glenn Drewes, Dolores Dudek, Alan Dyer, Charles W. Eastwood, Sharon Gardner, Robert W. Greenfield, Heidi Hanson, Nola Hirdman, Rita M. Hoffman, Michelle Jenkins, David A. Jognia, Martha Kadow, Michael S. Klempner, Joe Koegal, Barbara F. Larrabee, Alen Mathey, John P. Middlewood, Ron Nelson, Vicky Nelson, Teresa Odell, Patricia Olson, Raymond L. Olson, Jaimee A. O'Neill, Lloyd C. Pack, Jr., Ruth Padres, Charles Reynolds, Janice Rider, Mary C. Roundy, Sandi Sidor, Margaret Speiess, Debora Stainbrock, Ben Suescum, Mario Torres, Tirsh J. Triana, Bart Walsh, Michael D. Walsh, III, Kenneth L. Weichel, Elizabeth M. Willis, and De Vere Wolsey.

**Respondents:** Shelby Obershaw, President, San Bernardino City Unified School District ("SBCUSD"), in her official capacity; Hardy L. Brown, Vice President, SBCUSD, in his official capacity; Elisa Diaz, Marlin L. Brown, Howard B. Grossman, Dr. Chuck Christie, and Lawrence E. Neigel, members of the SBCUSD School Board, in their official capacities; E. Neal Roberts, Superintendent of SBCUSD, in his official capacity; Joseph Woodford, Director of Employee Relations for SBCUSD, in his official capacity; and the San Bernardino Teachers Association.

The California Teachers Association and the National Education Association were originally defendants in the district court, but plaintiffs dismissed them from the action on June 30, 1988.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Debra J. Grunwald, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 19, 1993, in case No. 88-6617.

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## OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 994 F.2d 1370 and are reprinted in the Appendix ("App.") to this Petition at 1a-18a. The unreported order granting the petition for rehearing, rejecting the suggestion for rehearing *en banc* and withdrawing the panel's original opinion is reprinted at App. 19a. The original opinion of the court of appeals' panel is reported at 917 F.2d 1223 and is reprinted at App. 20a-38a. The unreported final opinion and judgment of

the United States District Court for the Central District of California is reprinted at App. 39a-43a.

## JURISDICTION

The original judgment of the court of appeals was entered on October 31, 1990 (App. at 20a). A timely petition for rehearing was granted on June 9, 1992 (App. at 19a), and the subsequent judgment was not filed until May 19, 1993 (App. at 1a). This petition is filed within ninety days of that date. *See* Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (West Supp. 1993).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The First Amendment to the United States Constitution** states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." **Section 1 of the Fourteenth Amendment** maintains: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

**The Civil Rights Act of 1871, 42 U.S.C. § 1983** (1981), says in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The **state statutes** involved are the California Education Employee Relations Act ("EERA"), California Gov't Code §§ 3540.1(i)(2), 3546 (West Supp. 1993); the California Educ. Code § 45061 (West Supp. 1993). Their pertinent provisions are reprinted at App. 44a.

## STATEMENT OF THE CASE

Petitioner Debra Grunwald and the other forty-eight petitioning nonunion teachers ("teachers") filed suit in the district court under 42 U.S.C. § 1983, alleging that the procedure by which Respondents San Bernardino Teachers Association ("Association" or "union") and San Bernardino City Unified School District ("District") collect agency shop fees[1] from nonmember teachers violates their First and Fourteenth Amendment rights as enumerated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). App. at 4a, 41a.

The teachers challenged the procedure because it fails to provide "advance notice" and "advance reduction" of the fees. The union does not distribute the notice required by *Hudson* to nonmembers until several weeks **after** the first fee deductions occur on September 30. Moreover, the amount of the fees automatically deducted from nonmembers **is equal to** 100% of members' dues, although the notices admit the union's chargeable expenditures are less than 100% of dues. Each fee deduction made by the District is in the amount of one-tenth of the annual membership dues.[2] If a nonmember objects to the

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[1]Pursuant to Cal. Gov't Code §§ 3540.1(i)(2), 3546, the Association and the District have an agency shop agreement which requires teachers who choose not to join the union to pay a fee to the union for acting as their bargaining representative and to offset their pro rata share of the costs of that representation. App. at 2a.

[2]Pursuant to Cal. Educ. Code § 45061, the agency fees are automatically deducted by the District during the ten-month school year, with the first deduction occurring on September 30 and the last on June 30.

amount of the dues-equivalent fee, the union eventually sends him or her a rebate check[3] for the portion of the fee the union stated in the notice was attributable to matters unrelated to collective bargaining. App. at 2a-4a.

The district court ruled that these aspects of the union's agency fee procedure were constitutional and denied the teachers' requests for temporary, preliminary and permanent injunctions against the collection of dues-equivalent fees.[4] App. at 23a, 42a. The court held that *Hudson* does not require advance reductions in the amount of fees exacted when the union initially places all nonmember funds into an escrow account. The court also declared *Hudson* does not require the *Hudson* notices to be distributed in advance of the fee deductions. App. at 41a.

On November 3, 1988, the teachers timely appealed the district court's denial of the injunctions against fee collections and the approval of the union's collection procedures. Specifically, the appeal challenged the constitutionality of the union's

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[3]The 1987-88 procedure reviewed by the district court permitted the annual rebate for objecting teachers who accepted the union's calculation of the chargeable percentage to be issued by December 7 but delayed the issuance of the rebate for objectors who challenged the union's calculation and requested the opportunity to have the amount of the fee determined before a neutral decisionmaker until after receipt of the neutral's decision. Thus, objectors received the entire year's rebate after paying three-tenths of the annual agency fee (via deductions at the end of September, October and November). Challengers did not receive their rebate checks for the entire year until after the March 31 fee deduction and after paying seventh-tenths of the annual fee.

[4]The district court did issue a temporary restraining order and a preliminary injunction requiring the union to place all agency fees collected in an escrow account, and a permanent injunction ordering the union to include language in its procedural notice stating the union bears the burden of proof on the issue of what percentage of fees is chargeable to collective bargaining. The court also ordered the union to pay a rebate to all teachers named on the complaint, even if they had not followed the formal objection procedures required by the union.

failure to provide advance notice and advance reduction of the fee amount. App. at 4a, 21a, 24a, 26a-29a.

On October 31, 1990, the panel, in an opinion written by Circuit Judge Brunetti in which Circuit Judge D.W. Nelson joined (and from which Circuit Judge Kozinski vehemently dissented), originally reversed the district court's approval of the union's refusal to provide advance notice and advance reduction of the fee amount.[5] App. at 20a-38a.

Notwithstanding *Hudson*'s incorporation of the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he [or she] disbelieves," 475 U.S. at 305, Judge Kozinski dissented because he considered the amount and type of the teachers' claim too insignificant to warrant consideration by the overburdened federal judiciary.[6] In fact, Judge Kozinski later cited *Grunwald*

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[5]The original panel declared: "We * * * hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees. Because the collection of agency shop fees infringes nonunion employees' First Amendment rights, the procedure for the collection of the fees must be carefully tailored to minimize the infringement. In order to be carefully tailored, the union must deduct only the amount it is entitled to, i.e. the amount arguably related to its collective bargaining expenses.

Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim.

We * * * hold that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." App. 27a-28a, 29a (citations and footnote omitted; emphasis in the original).

[6]For example, Judge Kozinski opined: "This case is about $8 a month in union agency fees. And it's not even about *who* gets the $8—everybody agrees that [the teachers] are entitled to the money—but about the precise timing and procedure for the rebate. It is over such a trifle—such a *bagatelle*, as the

as an example of litigation that is "a bludgeon for striking at political adversaries," not "a tool for vindicating important rights." *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1227 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2306 (1992) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing *en banc*).

Then, on June 9, 1992, Circuit Judges Nelson and Kozinski voted to grant the union's petition for rehearing (Circuit Judge Brunetti dissenting) and to withdraw the opinion of October 31, 1990. On May 19, 1993, a new opinion—now written by Circuit Judge Kozinski in which Circuit Judge D.W. Nelson joined (and from which Circuit Judge Brunetti dissented)—was issued. The new panel majority now affirmed the district court and held that the union's "objection process does not impermissibly impinge on the plaintiffs' First Amendment rights." App. at 12a.

Although the new panel majority admitted that *Hudson* had established the advance reduction as "the **preferred** method of doing things," App. at 9a (emphasis added),[7] it, nevertheless,

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French would call it—that this lawsuit is brought, with all the attendant costs and burdens of modern litigation. * * * [The teachers'] frustration is understandable, but they have chosen the wrong forum for resolving what is essentially a political dispute.

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. Life in modern society is complicated and not every dissatisfaction should find a remedy in court. * * * We have a responsibility to avoid encouraging such lawsuits, which are not only costly to the parties involved but divert scarce judicial resources from more pressing and significant issues." App. 32a, 38a (Kozinski, J., dissenting) (emphasis in original).

[7]"Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—is a burden they cannot be required to bear, unless there's a **compelling** reason for requiring it and the procedure itself is reasonable.

held that the union had provided an adequate explanation for resorting to the "deduction-escrow-refund" procedure. The panel majority believed that since

> [p]ublic school teachers are employed on a school year by school year basis [with v]irtually all new employees begin[ing] work at the same time—around September 1, when the academic year starts[,] * * * it would be highly impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which comes at the end of September. Because the procedure is reasonable in light of the annual and fluctuating nature of elementary school employment and the burden on agency fee payers is relatively slight, we hold that this is the type of "appropriately justified advance reduction" approved by the Court in *Hudson*. 475 U.S. at 309.

App. at 9a-10a (citations omitted).

Circuit Judge Brunetti, now in dissent, agreed with the teachers that this Court's precedents concerning compulsory union fees require an advance reduction.

> Where the [union's] procedure fails is that it is not "carefully tailored to minimize the infringement" on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are

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We interpret th[e] language in *Hudson* as expressing a **strong preference** for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be **avoided altogether**. To employ the more cumbersome and **intrusive** deduction-escrow-refund procedure, the union must provide an 'adequate explanation,' which we interpret to mean that the union must show that the **preferred** method of doing things is **impossible** or, at any rate, far more costly or cumbersome." App. at 8a-9a (footnote omitted, emphasis added).

> to be refunded. The District and the Union fail to justify their failure to use procedures which they have already tried or considered which impinge less on the fee payers' rights. In fact, the procedure as adopted is obviously for the convenience of the District and the Union with no consideration of the infringement on the fee payers' rights.

App. at 15a (footnote omitted) (Brunetti, J., dissenting).

Although the original majority discussed and found unconstitutional the union's failure to provide advance notice of the fee deductions, the new panel majority's opinion is devoid of any discussion of the "advance notice" issue. Since it affirmed the district court, which had found that *Hudson* did not require notice to be given in advance of the first deduction of dues-equivalent fees, the panel majority *sub silentio* held that advance notice of property seizures is never required by the First and Fourteenth Amendments.

## REASONS FOR GRANTING THE WRIT

### I. THE QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST AMENDMENT FREEDOMS AND THE RECENT CONFUSION OF THE COURTS OF APPEALS AS TO THEIR RESOLUTION

Seven years ago, this Court unanimously enunciated the procedural safeguards the Constitution requires a union and the government to provide "for the collection of agency fees" from nonunion employees, *Hudson*, 475 U.S. at 310, *see also id.* at 306, 309. Initially, the lower federal and state courts interpreted *Hudson* to require both an advance reduction and advance notice of the amount of agency fees as part of the procedural safeguards necessary for the constitutional collection of agency

fees from objecting nonmembers.[8] However, within the last three years, a conflict has developed among the lower courts over both issues.[9]

Shortly after the conflict among the circuits first occurred, this Court granted certiorari to review the Eleventh Circuit's

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[8]*See Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-06 (6th Cir. 1987) (*Tierney I*); *accord Cheeseman v. Jay Sch. Corp. Classroom Teachers Ass'n*, 527 N.E.2d 715, 718 (Ind. App. 4th Dist. 1988).

Even before *Hudson*, most lower courts were requiring advance reduction and advance notice. *See Galda v. Rutgers*, 772 F.2d 1060, 1068 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (*Galda II*); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192, 1199 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); *Galda v. Bloustein*, 686 F.2d 159, 167, 168 n.16 (3d Cir. 1982) (*Galda I*); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970); *In re Bd. of Educ. of Town of Boonton*, 494 A.2d 279, 293-94 (N.J. 1985), *cert. denied sub nom. Kramer v. Public Empl. Rel. Comm'n*, 475 U.S. 1072 (1986); *Carlson v. AFSCME*, 700 P.2d 260, 268 (Or. App.), *review denied*, 710 P.2d 147 (Or. 1985); *contra Beck v. Communications Workers*, 776 F.2d 1187 (1985) (2-1 decision), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986) (6-4 decision), *aff'd*, 487 U.S. 735 (1988); *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

[9]*Compare Hohe v. Casey*, 956 F.2d 399, 405-06, 414 (3d Cir. 1992) (*Hohe II*); *Dashiell v. Montgomery County*, 925 F.2d 750, 754, 756 (4th Cir. 1991); *Dean v. TWA*, 924 F.2d 805, 808, 809 (9th Cir. 1991); *Tierney v. City of Toledo*, 917 F.2d 927, 936-37 (6th Cir. 1990) (*Tierney II*); *Schneider v. Colegio de Abogados*, 917 F.2d 620, 634-35 & n.22 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 865 (1992); *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500, 513 (Cal. 1993) (5-2 decision), *petition for cert. filed* (U.S. July 14, 1993) (No. 93-82) (cases requiring advance reduction and/or advance notice) *with Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir. 1993) (2-1 decision), App. at 1a; *Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990) (2-1 decision), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 633 (1991); *Crawford v. Air Line Pilots*, 870 F.2d 155, 160-61 (1989), *adopted*, 992 F.2d 1295 (4th Cir. 1993) (*en banc*); *Jerabek v. Public Empl. Rel. Bd.*, 4 Cal. Rptr. 2d 181 (Cal. App. 3d Dist.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 56 (1992) (cases not requiring advance reduction and/or advance notice).

approval in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), of the Florida Bar's procedures for handling objections to the Bar's use of compulsory bar dues to fund its political lobbying.[10] *Gibson v. Florida Bar*, ___ U.S. ___, 111 S. Ct. 1305, *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 633 (1991).

Like the union's procedures approved by the Ninth Circuit herein, the Bar's procedures approved by the Eleventh Circuit failed to provide objectors with either pre-collection reduction or notice of the dues amount. *Gibson*, 906 F.2d at 627-29 & n.8. Moreover, the questions presented by the *Gibson* certiorari petition included both the advance reduction and advance notice issues. *See*, Petition for a Writ of Certiorari, *Gibson* (No. 90-1102).

However, after the Florida Supreme Court's decision in *Florida Bar Re Frankel*, 581 So.2d 1294 (Fla. 1991), which adopted the advance reduction requirement by limiting all dues as a matter of state law to the constitutionally chargeable amount, this Court dismissed the writ of certiorari as improvidently granted, *Gibson v. Florida Bar*, ___ U.S. ___, 112 S. Ct. 633 (1991).

During the two years since this Court dismissed *Gibson*, the resolution of the advance reduction and advance notice issues has continued to split the lower courts. *See supra* note 9. Once again these significant questions of first amendment due process[11] are firmly presented in the record of this case.

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[10]In *Keller v. State Bar of California*, 496 U.S. 1, 15-17 (1990), this Court held that as a pre-condition to collecting compulsory dues, an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*." *Id.* at 17.

[11]Freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society." Therefore, in protecting First Amendment rights, "the **procedures** * * * assume an importance fully as great as the validity of the substantive rule of law to be

Furthermore, these are important questions due to the large number of public employees whose First Amendment freedoms are burdened by compulsory union fee arrangements. As of 1987, almost 3.9 million public employees are subjected to such compulsion in the twenty states and the District of Columbia that permit or require payment of monies to the union as a condition of public employment. U.S. DEP'T OF COM., 3 CENSUS OF GOV'TS, PUB. EMPL. (1987). And, of course, the Court's disposition of these questions could also be precedential in integrated bar cases, because of the "substantial analogy" between the integrated bar and compulsory union fee arrangements. *See Keller*, 496 U.S. at 11.

This Court granted certiorari in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), to twice consider the constitutionality of procedures adopted by unions to determine the amount of compulsory deductions and respond to nonmembers' objections. Indeed, in *Hudson*, as here, the only questions presented concern what procedural safeguards are required by the First and Fourteenth Amendments for the collection of compulsory fees. The Court explicitly cited the "importance of the case, and the divergent approaches of other courts to the issue," as reasons for granting certiorari. *Hudson*, 475 U.S. at 300. Now a panel majority of the Ninth Circuit has denied the procedural safeguards established by this Court.

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applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958) (emphasis added); *see Hudson*, 475 U.S. at 303 n.12.

## II. IN ALLOWING THE "DEDUCTION-ESCROW-REFUND" OF THE NONCHARGEABLE AMOUNT OF AN OBJECTOR'S AGENCY FEE, INSTEAD OF REQUIRING AN "ADVANCE REDUCTION," THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON*, *BECK*, *ELROD* AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

### A. The Conflict With *Hudson*, *Beck* and *Elrod*

Following rehearing, the new panel majority held, Circuit Judge Brunetti dissenting, that an "escrow scheme poses no risk that [the teachers'] substantive free speech rights will be violated," and thus, "obviate[s] the need for advance reductions" because "*Abood [v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], *Ellis* and *Hudson* * * * categorically prohibit only one type of First Amendment harm: use of nonmembers' money to promote causes they do not believe in." App. at 5a & n.2, 7a; *contra id.* at 14a-15a, 17a-18a (Brunetti, J., dissenting).

That holding conflicts with *Hudson*, which clearly recognized the right to be free from the **collection** of union fees as a First Amendment right, which may be infringed only to serve the compelling state interest of reimbursing a union for its costs of collective bargaining, and then only through narrowly drawn procedures that minimize the risk that any more might be collected. 475 U.S. at 302-03 & n.10.

This Court prescribed procedural safeguards to ensure against **both** excessive collections **and** misuse of the fee once collected. Had this Court been concerned only with misspending or misuse, as the panel majority contended, then it would have accepted the union's post-deprivation remedy of 100% escrow and required a prompt review of the union's calculation of the fee amount by an impartial decisionmaker, since these are the only remedies needed to "eliminate[ ] the risk that nonunion

employees' contributions may be * * * used for impermissible purposes." *Hudson*, 475 U.S. at 309.[12]

Because the collection violations cannot be remedied by an escrow, this Court firmly rejected the union's argument that a 100% escrow "eliminates any valid constitutional objection * * * and thereby provides an adequate remedy in this case." Instead, the Court found "the procedure remain[ed] flawed * * * [because i]t does not provide an adequate explanation for the **advance reduction of dues**." *Id.* (emphasis added). Moreover it specifically ruled that "[a] forced **exaction** followed by a **rebate** equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections." *Id.* at 305-06 (emphasis added).[13]

Accordingly, *Hudson* held "the **constitutional** requirements for the union's **collection** of agency fees include an **adequate**

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[12]This Court also would not have proclaimed that "in this context, the procedures required by the First Amendment also provide the protection necessary for any **deprivation of property**." *Hudson*, 475 U.S. at 304 n.13 (emphasis added). Furthermore, the Court knew from the Seventh Circuit that the question presented in *Hudson* involved more than the use of the objectors' money. "The question here is whether the [objecting teachers] have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has **not used** any of the money it has collected from objecting employees * * * [the objecting teachers] can still complain that they have been **deprived** of the liberty secured them by the Constitution. **We think they can** * * *." *Hudson*, 743 F.2d at 1192 (emphasis added). Even though there may have been no use violation, only a collection violation, this Court found that the objecting teachers had "established a constitutional violation," for which the district court should fashion a proper remedy. *Id.*, 475 U.S. at 309 n.22.

[13]Two years after *Hudson*, this Court applied this principle to the private-sector. "[U]nions [are not] free to **exact** dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective bargaining activities. * * * Congress * * * authoriz[ed] the **collection** of **only** those fees necessary to finance collective bargaining activities." *Communications Workers v. Beck*, 487 U.S. 735, 759 (1988) (emphasis added).

**explanation** of the **basis** for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an **escrow** for the amounts **reasonably in dispute** while such challenges are pending." *Id.* at 310 (emphasis added).

The panel majority also cited *Ellis*, 466 U.S. at 443-44, which identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." *See* App. at 5a-8a. However, as *Hudson* explains, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did not decide whether an interest-bearing escrow account, **by itself**, would be constitutionally sufficient, since, "for purposes of [*Ellis*], it was sufficient to strike down the rebate procedure." *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444). That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of the objectors' service fees. Unlike *Ellis*, the amount of fees collected was less than union dues, because the union had made a 5% advance reduction[14] for activities not germane to collective bargaining and contract administration. *Id.* at 295-96, 304.

As recognized by Circuit Judge Brunetti, *Hudson* answered that question by, first, requiring escrow only "for the amounts **reasonably in dispute** while such challenges are pending," not all amounts, including sums the union admits it is not entitled to keep. App. at 13a (Brunetti, J., dissenting) (quoting *Hudson*, 475 U.S. at 310) (emphasis added). Furthermore, "an independent audit, **in advance, coupled with adequate notice**, might

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[14]The fact that the teachers' union in *Hudson* provided an "advance reduction" repudiates the panel majority's claim that the deductions of full union dues from the teachers in this case "is the type of 'appropriately justified advance reduction' approved by the Court in *Hudson*." App. at 10a; *see also* App. at 13a (Brunetti, J. dissenting).

reduce the size of any appropriate escrow." *Hudson*, 475 U.S. at 310 (emphasis added).

Then, this Court held that **in addition** to that escrow, and other safeguards, an "appropriately justified **advance reduction** * * * **[is] necessary** to minimize both the impingement [on nonunion employees' First Amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). Thus, *Hudson* requires **both** escrow of the amounts in dispute **and** advance reduction of the amounts undisputedly attributable to ideological and other purposes unrelated to collective bargaining.[15]

Notwithstanding the clarity of the requirements of *Hudson*, the panel majority still doubted that the teachers had suffered "a substantive First Amendment injury because they are denied use of their money temporarily, so they can't use it to promote First Amendment causes they support." App. at 7a.[16]

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[15]*Hudson*, 475 U.S. at 294, also opens with this significant quotation: "In *Abood*, 'we found * * * [t]he union * * * could not, consistently with the Constitution, **collect** from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.' *Ellis*, 466 U.S. at 447. The *Ellis* case was primarily concerned with the need 'to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being **imposed** on dissenters.' *Ibid.* In contrast, this case concerns the constitutionality of the **procedure** * * * to draw that **necessary line** and to respond to nonmembers' objections to the manner in which it was drawn." (Citations omitted; emphasis added).

[16]The panel majority also opined: "Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case." App. at 7a. By this exaggeration, the panel majority hopes to obscure the fact that every tax refund suit and every monetary claim against a governmental entity does not involve an underlying seizure of property that, like the agency shop, is itself an "infringement on * * * constitutional rights * * * protected by the First Amendment [that] requires * * * procedure[s to] be carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303 (footnotes omitted); *see also id.* at 309.

However, prior to *Hudson* this Court had found the deprivation of the use of one's money, no matter how small,[17] a substantive First Amendment injury in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (citations omitted; emphasis added).

> The cost of the practice of patronage is the **restraint it places on freedoms of belief and association.** * * * [A]ny assessment of [the objecting employee's] salary is tantamount to coerced belief. * * * Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, **the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained**, and support for his party is diminished.

*Accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).[18]

Although the panel majority admitted *Hudson* expressed "a strong preference for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be avoided altogether," it, nevertheless, held that agency fee payers can be required "to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—* * * [if] there's a compelling reason for requiring it." Later, the panel majority

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[17]"This Court's decisions have prohibited conditions * * * which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 556 n.11. "Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.* at 557 n.13.

[18]As already demonstrated *supra* pp. 12-14, *Hudson* specifically extended these principles to the "Union's collection of agency fees." *Id.* at 310 (emphasis added); *see also id.* at 309.

even whittled "compelling reason" down to "an adequate explanation" by the union. App. at 8a-9a.

The "adequate explanation" accepted by the panel majority was: "Public school teachers are employed on a school year by school year basis * * * [which creates an] annual and fluctuating nature of elementary school employment * * * ." *Id.* at 9a, 10a. Moreover, the panel majority accepted the union's assertions that it needs "the home addresses of all new teachers and, most importantly, the names of the teachers who choose to be agency fee payers that year" which are not available "before the first monthly paycheck, which comes at the end of September."[19] *Id.*

Though the panel majority recognized that there are other systems "that would minimize further the burden on agency fee

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[19]These assertions are "red herrings." First, home addresses are not needed to provide nonmembers with their *Hudson* notices. The notices can be delivered to their school addresses, which both the school district and union know shortly after school starts in September. Second, the panel majority mistakenly asserts that teachers "choose to be agency fee payers." App. at 9a. This statement presumes that all new employees are automatically union members, unless they have taken some affirmative act to "be[come] agency fee payers." However, a "policy of voluntary unionism" is imbedded in the collective bargaining legislation of this country. *See Pattern Maker's League v. NLRB*, 473 U.S. 95, 104-07 (1985). This policy "protects the employment rights of the dissatisfied member [who resigns], as well as those of the worker who never assumed full union membership." *Id.* at 106. Therefore, rather than automatically being union members, all new employees are automatically nonmembers until they take some affirmative act to assume full union membership. Accordingly, the union does not need a month to determine which new teachers "choose to be agency fee payers." Instead, at the beginning of September it can quickly compare the list of new and returning teachers, provided by the district, with its own list of union members. It will immediately know and have time to send the *Hudson* notice to all nonmember teachers before the first pay check is issued on September 30.

payers," it rejected them,[20] because they would require "the school district and the union to bear [an] additional administrative burden." *Id.* at 10a n.7.

Circuit Judge Brunetti correctly compared the union's problematic excuses to "the District [and the union] refusing to follow *Brown v. Board of Education*, 349 U.S. 294 (1955), because integration imposes too much of an administrative burden." Moreover, the union's objection to delay "collection of the fee until December" "does not hold water," either, because "the Union is already 'deprived' of the agency fees for four months of each year (because the fees go straight into escrow and do not come out until rebates are paid)." App. at 17a (Brunetti, J., dissenting).

> The majority baldly asserts that "the Constitution [does not] require[ ] the school district and the Union to bear the additional administrative burden of operating a[n advance reduction] system" without citing any evidence that such a system would impose any extra burden. There are other procedures recognized and rejected by the District and the Union which would minimize the infringement on the fee payers, and no adequate reasons other than convenience to the District and the Union have been advanced for failing to use those less impinging systems.

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[20]Using the current October 15 notice schedule, collection of the initial fees could be delayed to the end of November. Otherwise, collection of the initial fees could start on September 30, if the notice was distributed during the first week of school to all teachers who had opted to be agency fee payers in the previous school year and all new employees who had not assumed full union membership. App. 10a n.7, 15a-16a & n.1. Under either system, an advance reduction could be achieved by either the school district deducting a different (and smaller) amount from objecting agency fee payers than for nonobjecting fee payers and union members; or, if the district deducts the same amount from all employees, the union providing objectors with a rebate check prior to the first dues-equivalent fee deduction.

> The District's deduct-escrow-refund procedure fails to protect the fee payers' constitutional rights as identified in *Hudson* * * * .

*Id.* at 17a-18a.

This Court has repeatedly refused to accept "administrative convenience" as a justification for contravening a constitutional mandate. "'While [the *Hudson*] procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 496 U.S. at 16-17 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192 (1989) (Kaufman, J., concurring and dissenting)); *see also Ellis*, 466 U.S. at 444; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974) ("administrative convenience alone is insufficient to make valid what otherwise is a violation of" individual constitutional rights).

More importantly, the "annual and fluctuating nature of elementary school employment" and all the other problematic excuses accepted by the panel majority below were present before this Court in *Hudson*, which involved the school district in Chicago and its recognized teachers' union. None of these "administrative burdens," intrinsic to elementary education, prevented this Court from specifically requiring advance reduction as part of those "carefully tailored" procedures necessary to "minimize the infringement." *Hudson*, 475 U.S. at 303-07 & n.20.

Finally, because First Amendment rights are affected, strict scrutiny mandates that the union demonstrate a compelling **state** interest,[21] not a rational **union** reason, for using the "deduction-escrow-rebate" scheme. As already established, that burden

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[21]"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362.

cannot be met here[22], especially since the union's affiliates in other states all have the same "legitimate logistical reasons," relied upon herein—nevertheless, they provide both advance reduction and advance notice.[23] Thus, the union's "deduction-escrow-rebate" procedure "is not 'carefully tailored to minimize the infringement' on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are to be refunded." App. at 15a (Brunetti, J., dissenting).

### B. The Conflict Among Courts Of Appeals

The panel majority's holding that an advance reduction is not constitutionally required under *Hudson* also directly conflicts with the decisions of three other United States courts of appeals, the Third, Sixth and Seventh Circuits, as well as other panels of the Ninth Circuit. However, the panel majority's holding is supported by decisions of two other United States courts of appeals, the Fourth and Eleventh Circuits.

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[22]"Since • • • it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular [objecting teacher] will rest on the [union, with] cases of doubt being resolved in favor of the particular [teacher]." *Elrod*, 427 U.S. at 368.

[23]*See Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich. 1989) (by November 30 the Michigan Education Association determines the amount of the "reduced fee that an objector will be required to pay" and thereafter provides to all nonunion employees notice, financial information and the opportunity to object and/or challenge the reduced fee calculation within 30 days of receipt of the notice; "[c]ollection of service fees for non-members will not begin until after the period for written objection has expired"); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1430, 1473-76 (N.D. Ohio 1987) (by December 15 the Ohio Education Association will send each nonmember an explanation of the basis for the chargeable agency fee and opportunity to object and/or challenge the fee calculation by January 15; "[t]he first deduction of the fee will not occur prior to January 15th").

In *Hohe II*, 956 F.2d at 414 (emphasis added), the **Third Circuit** correctly found that "[i]n calculating the fair share fee, a union is required to determine an appropriate **advance reduction**."[24]

Three different panels of the **Sixth Circuit** have ruled that

> *Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological functions.

*Damiano*, 830 F.2d at 1369; *accord Tierney II*, 917 F.2d at 937; *Tierney I*, 824 F.2d at 1502-04.[25]

In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of the dues that indisputably represents **non-**chargeable expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

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[24]*See infra* note 8. Even before *Hudson*, the Supreme Court of New Jersey had required the teacher union's "computation of the current year's representation fee for nonmembers to exclude that percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to nonmembers." *Boonton*, 494 A.2d at 293-94.

[25]"[T]his plan, contrary to *Hudson*, creates a forced exaction followed by rebate. The foregoing procedures violate *Hudson* because the fee in its entirety is placed in escrow, whereas under *Hudson*, as we read it, only those sums which correspond to amounts reasonably in dispute and, at the union's option, indisputably agreement-related, may be placed in escrow." *Tierney I*, 824 F.2d at 1506.

Prior to *Hudson*, another panel of the Ninth Circuit had recognized both the "use" and "**collection**" violations inherent in the forced exaction of the nonchargeable monies to the union.

> The diversion of the employees' money from use for the purposes for which it was exacted damages them doubly. Its utilization to support candidates and causes the plaintiffs oppose renders them captive to the ideas, associations and causes espoused by others. At the same time **it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.**

*Seay*, 427 F.2d at 1004 (emphasis added).[26]

In abandoning the principle of *stare decisis*, the panel majority rationalized its refusal to follow its own **Ninth Circuit** precedent because "in the two decades that the *Seay* dictum has been on the books, it has never been followed; its precedential effect has been dissipated by the Supreme Court's intervening ruling in *Hudson*." App. at 7a n.4. Nothing could be further

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[26]After *Seay*, but before *Hudson*, the Oregon Court of Appeals also required the union to "reduce the fair-share dues pro-rata in advance." *Carlson*, 700 P.2d at 268. After *Hudson*, another panel of the Ninth Circuit seemed to support the concept of advance reduction when it held that a union's "failure to institute *Hudson* procedures can serve as a justification for [a nonmember's] unilateral reduction of fees." Furthermore, it ruled that the union's "argument that [the nonmember] should have continued paying dues while seeking judicial redress is inconsistent with the Supreme Court's rejection of any type of rebate remedy." *Dean*, 924 F.2d at 809. Finally, the California Supreme Court in a student fees case has just held that "the procedures outlined in *Hudson* * * * will require the Regents to identify any groups that are ineligible for mandatory funding under the constitutional standards * * * and offer students the option of **deducting** a corresponding amount from the mandatory fee." *Smith*, 844 P.2d at 513 (citations omitted; emphasis added).

from the truth. As already noted, this Court recognized the same constitutional principle in *Elrod* and expanded it in *Hudson*,[27] while the Sixth Circuit in *Damiano* adopted the reasoning and holding of *Seay*.

On the other side of the conflict, both the Fourth and Eleventh Circuits agree with the panel majority's holding "that escrow accounts obviate the need for advance reductions." App. at 5a n.2.[28]

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[27]Circuit Judge Posner for the **Seventh Circuit** in *Hudson*, 743 F.2d at 1192, had already accepted this same constitutional axiom: "[T]he money that an objecting employee is compelled against his [or her] will to spend to support a union's political views is money not available to him [or her] to support other political activities, and this indirect effect on the marketplace of ideas is we think sufficient to require the creation of procedures that protect against such compulsion." Circuit Judge Flaum, concurring, also agreed: "The temporary use of funds for improper purposes injures [objecting nonmembers] in two ways: it causes them to subsidize ideas with which they disagree; and it depletes their funds available for supporting causes with which they agree." *Id.* at 1199. Only advance reduction, not escrow, protects against the depletion of one's available funds for supporting causes with which they agree and the indirect, but important, injury on the marketplace of ideas.

Following *Hudson*, the Indiana Court of Appeals also held that "[t]he First Amendment * * * requires the unions to provide nonmembers with an '**advance reduction of dues**,' that is, the unions must deduct from the dues charged to union members the costs of the unions' political and ideological activities unconnected with the costs of collective bargaining and contract administration **before they may collect** the sum remaining, i.e., the fair share fee, from nonmembers." *Cheeseman*, 527 N.E.2d at 718.

[28]The panel majority incorrectly cites *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) (*Hohe I*); and *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. Neither *Andrews* nor *Hohe I* is directly on point. Advance reduction was not one of the issues determined in *Andrews*, 829 F.2d at 338-41, and the procedure there also **apparently provided** an advance reduction, *see id.* at 337-38. *Hohe I*, 868 F.2d at 70, 74 n.7, was a decision on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits;" moreover, the procedure

In *Crawford*, 870 F.2d at 160-61, the **Fourth Circuit** noted in dictum[29] that the union's plan for the collection of agency fees from nonmembers may provide "an interest-bearing escrow account as an alternative to advance reduction."[30]

Then, as this Court knows, *see supra* pp. 9-10, a divided panel of the **Eleventh Circuit** ruled that, when using compulsory bar dues to fund its political lobbying, the bar is not required to provide an objecting member with an advance deduction for the proportion of dues that the bar knew would be used for political

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in *Hohe* **did provide** an advance reduction, *see Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989). Moreover, as already noted *supra* p. 21, in *Hohe II*, 956 F.2d at 414, the Third Circuit conclusively required unions to use the **advance reduction** method in calculating the agency fee. Furthermore, prior to *Hudson*, the Third Circuit had already determined that while *Railway Clerks v. Allen*, 373 U.S. 113 (1963) had "intimated strongly that * * * a refund could cure **past** improper exactions of a fee, **future** exactions should be **reduced, pro rata, prior** to collection." *Galda I*, 686 F.2d at 167 (emphasis added). This was reaffirmed in *Galda II*, 772 F.2d at 1068, where procedures still had not been established "that would allow an advance proration" of a mandatory student fee between constitutionally chargeable and nonchargeable purposes. Therefore the court held that exaction of that fee "cannot continue". *Id.*

[29]The ruling was dictum because the union's plan was "a hybrid reduction-escrow system." *Crawford*, 870 F.2d at 161.

[30]Prior to the *en banc* ruling, a panel of the Fourth Circuit held the opposite. A union "may not use a rebate approach under which it collects uniform union dues from all employees and later returns the portion unrelated to collective bargaining to nonunion employees. The union must use an approach by which amounts charged for collective bargaining services are reasonably calculated to be correct from the outset. * * * The core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*." This "underpinning principle mandates that the union follow required procedures **in advance of assessing a fee**." *Dashiell*, 925 F.2d at 754, 756 (citations omitted; first emphasis in original; other emphasis added).

activity because "an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient." *Gibson*, 906 F.2d at 631.

It is clear that the courts below are in disarray on whether first amendment due process requires the advance reduction **AND** escrow of compelled fees, or whether the agents of compulsion may, for their own convenience, choose between advance reduction **OR** escrow. It is imperative that this Court grant the petition for certiorari and decisively resolve the critical questions presented by the record and decision of the Ninth Circuit herein.

## III. IN ALLOWING THE *HUDSON* NOTICE TO BE GIVEN SEVERAL WEEKS AFTER, RATHER THAN BEFORE, THE DUES-EQUIVALENT FEE DEDUCTION BEGINS EACH YEAR, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HUDSON* AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

### A. The Conflict With *Hudson*

In its new decision following rehearing, the panel did not discuss the district court's holding "that an agency fee plan with post-deduction notice of *Hudson* rights * * * is constitutional," other than to affirm the district court in its entirety.[31] App. at 41a. The affirmance of the district court's failure to require

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[31]However, the original panel majority had held "that notice of and adequate information concerning the agency fee must be given to all nonmembers **before** any fees may be collected from them." App. at 29a. That panel based its holding on *Hudson*'s requirement of providing nonmembers with adequate information of the basis of the reduced fee. "Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his [or her] interests and assert a meritorious first amendment claim." *Id.*, *see also Hudson*, 475 U.S. at 303, 306-07.

advance notice, however, conflicts with this Court's holding in *Hudson* and other, earlier due process cases. *Hudson* held that the "constitutional requirements for the Union's **collection** of agency fees include an adequate explanation of the basis for the fee." 475 U.S. at 310 (emphasis added). A notice first given several weeks after the first exaction of dues-equivalent fees is untimely.

In *Hudson*, this Court identified several purposes for the disclosure "of the basis for the fee," in addition to informing nonunion employees that after the initial deductions they have a right to receive a prompt impartial determination of the union's calculation of the chargeable amount. *Id.* at 307-10. Moreover, an "100% escrow does not" satisfy these additional purposes: explaining what the deductions from their wages will entail; and providing "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," *id.* at 303, 310. Since "the governmental action on [their] interests" first occurs when the public employer automatically deducts the fees, not when the union uses their money, the notices and opportunity to object must occur prior to the seizure of the nonmembers' fees.[32]

Likewise, *Hudson* established these procedural safeguards to avoid a "remedy which merely offers the dissenters the possibility of a rebate," *id.* at 305-06, 310; *accord Ellis*, 466 U.S. at 443-44, and to "minimize th[e] impingement [caused by the agency shop itself on First Amendment rights] and * * * **facilitate** a nonunion employee's **ability to protect his rights**." *Hudson* 475 U.S. at 307 n.20 (emphasis added); *see also id.* at

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[32]This mandate cannot be any clearer, and the union engages in pure sophistry when it argues, as it did in the court below, that *Hudson* permits "ex post facto" notice concerning the agency fee seizures. The lower courts, discussed *supra* note 23 and *infra* pp. 27-29, had little difficulty requiring advance notice precisely because the union's arguments and the dissent in the original *Grunwald* opinion are so contrary to the spirit and the plain meaning of *Hudson*.

302-03 & nn.11, 12. Only a notice which timely **precedes** the initial collection of any compulsory fees can satisfy all of these requirements.

Moreover, pre-deprivation notice is the usual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be **preceded by notice** and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added).

Furthermore, the notice of the taking of property "must be granted at a time when the deprivation can **still be prevented**," because "no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (emphasis added).

### B. The Conflict Among Courts Of Appeals

The panel majority's decision upholding the union's post-collection notice scheme stands in stark contrast to and conflicts with decisions of the United States court of appeals for the First, Fourth, Sixth and Ninth Circuits.[33] Prior to the panel majority's *sub silentio* "ex post facto" approach to a constitutionally required notice, the **Ninth Circuit** also had required

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[33]However, the California Court of Appeal, relying on Circuit Judge Kozinski's original dissent in *Grunwald*, did uphold the constitutionality of a "concurrent notice with escrow" provision of a state regulation, permitting public-sector unions to collect agency fees from nonmembers before providing them with the notices required by *Hudson*. *Jerabek*, 4 Cal. Rptr. 2d at 186-87.

advance notice, originally on the basis of procedural due process, then on the basis of *Hudson*.[34]

*In Dashiell*, the **Fourth Circuit** ruled that "the union must * * * provide[e] the employee **advance information** about the fee **to be** charged * * * [and] follow required procedures in **advance of assessing a fee**." 925 F.2d at 754, 756 (emphasis added).

Similarly, the **Sixth Circuit** held:

> *Hudson* admonishes the union to give "*potential objectors* * * * sufficient information to gauge the propriety of the union's fee," **before it collects** any fees from non-members. *Hudson* require[s] that detailed financial information concerning all major categories of union expenses * * * be * * * provided to all non-members **before** any fees may be **collected** from them.

*Tierney I*, 824 F.2d at 1503, 1506 (first emphasis in original, other emphasis added; citations omitted) (quoting *Hudson*, 475 U.S. at 306).

In a case involving mandatory bar dues, the **First Circuit** in *Schneider*, 917 F.2d at 634, 635 n.22, held that it is the bar association's "obligation at the outset of a dues year to categorize its activities * * * [and] provide members at the beginning of the dues year with a proposed budget that classifies activities

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[34]"Due process requires reasonable notice to parties **before** action is taken to **deprive** them of **property**." *Zmuda v. C.I.R.*, 731 F.2d 1417, 1419 (9th Cir. 1984) (emphasis added). Between the issuance of the original and rehearing decisions of the panel herein, another panel of the Ninth Circuit specifically concluded that *Hudson* required "that **before collecting fees** through an agency shop agreement, a union must adequately **explain** the basis for the fee * * * [or] the union has no right to enforce an agency shop agreement." *Dean*, 924 F.2d at 808-09 (emphasis added).

as appropriate or inappropriate for mandatory financing."[35] Even before *Hudson*, the **Third Circuit** in *Galda I*, 686 F.2d at 168 n.16, found that the beginning of deductions discourages challenges.[36]

Common sense also does not support the panel majority's position either, because the very definition of the word "notice" means "[a]ny announcement, information, or indication of some present or coming event." *See e.g.*, THE AMERICAN HERITAGE DICTIONARY 897 (new coll. ed. 1978) In this context, the "coming event" is clearly the fee seizures, not the availability of a post-seizure method to get back those fees which should never have been taken in the first place.

As already established, the union cannot meet its burden of demonstrating a compelling **state** interest for deducting dues-equivalent fees for several weeks **before** distributing the *Hudson* notice, especially since the union's affiliates in other states provide notice **before** collection of the **reduced fee amount**.[37]

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[35]*Schneider*, 917 F.2d at 634, would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson, Damiano, Tierney I, Hohe II, Seay* and *Smith*. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

[36]The Third Circuit quoted and relied on the recommendation of *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 198 (1977) (emphasis added), that on the basis of *Abood*, unions should be required to make a schedule of estimated yearly disbursements available for inspection "**before** collecting fees from nonunion members," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association."

[37]*See supra* pp. 19-20 and note 21.

## CONCLUSION

When a state compels an individual to pay a fee to a union as a condition of employment, it infringes on his or her rights of free speech and association. *Hudson*, 475 U.S. at 301-02; *Ellis*, 466 U.S. at 455. This Court confirmed in *Hudson* that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement." 475 U.S. at 303.

As demonstrated above, the decision of the court of appeals' panel majority in this case ignores that general rule of First Amendment law; approves procedures which omit the important, minimum constitutional safeguards of advance reduction and advance notice explicitly mandated by *Hudson*, *Beck* and *Elrod*; and thus conflicts with both this Court's applicable decisions and decisions of most other United States courts of appeals on the same fundamental issues. Therefore, to settle the disarray among the lower courts, this Court should issue a writ of certiorari to the Ninth Circuit and set the case for plenary briefing and argument on both questions presented.

Respectfully submitted,

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